IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 10576 of 2000
with
SPECIAL CIVIL APPLICATION No 10577 of 2000
&
SPECIAL CIVIL APPLICATION No 10578 of 2000

For Approval and Signature:

Hon'ble MR.JUSTICE D.C.SRIVASTAVA sd/-

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

D W PARMAR

Versus

STATE OF GUJARAT

Appearance:
Mr.Y.N.Oza for MR SAURABH J MEHTA for Petitioner
Ms.Manisha Lavkumar, A.G.P. for Respondent No. 1, 2, 3
(in all the three matters)

CORAM : MR.JUSTICE D.C.SRIVASTAVA

Date of decision: 16/03/2001

C.A.V. COMMON JUDGEMENT

1. These three petitions involving common questions of law and fact are proposed to be disposed of by a

common judgment.

2. Since Affidavits have been exchanged in these petitions and since learned Counsel for the two side have consented that these petitions be finally disposed of at the admission stage it is proposed to dispose of these petitions finally at the admission stage.

3. In all the three petitions suspension order dated 27.4.2000 is under challenge.
Petitioner D.W.Parmar of Special Civil Application No.10576 of 2000 was appointed as Additional Assistant Engineer in Sardar Sarovar Narmada Nigam Ltd. on 27.12.1979. The petitioner A.V.Shah of Special Civil Application No.10577 of 2000 was likewise appointed as Additional Assistant Engineer in the Irrigation Department on 30.6.1982 and on 1.11.1994 he was deputed as Additional Assistant engineer in Sardar Sarovar Narmada Nigam Ltd. The petitioner T.R.Pandya of Special Civil Application No.10578 of 2000 was appointed as Additional Assistant Engineer in Irrigation Department on 26.2.1982 and in the month of May, 1990 he was deputed as Additional Assistant Engineer in Sardar Sarovar Narmada Nigam Ltd.

4. On 3.5.1999 the Assistant General Manager, Sardar Sarovar Narmada Nigam Ltd. wrote a letter to the petitioners seeking their explanation indicating negligence in discharging their duties for carrying out levelling work in the year 1994-95 vide Annexure : B. The petitioners T.R.Pandya and D.W.Parmar submitted their explanation on 19.6.1999 whereas petitioner A.V.Shah submitted his explanation on 18.6.1999 (Annexure : C). However, on 27.4.2000 the respondent No.3 passed an order of suspension against the three petitioners. Feeling aggrieved the petitioners have filed instant writ petitions. They also made representations to the Secretary, Narmada Water Resources and WS Department, but the said representations have not been decided hence the petitioners were forced to file these petitions.

5. The order of suspension has been challenged on several grounds. The first ground is that the petitioners were found indirectly responsible for showing gross negligence in discharging their duties in preparing and levelling work whereas under Government Circular the said work is to be undertaken by Deputy Executive Engineer and entered in ink directly in the Field Book hence the petitioners are not responsible in any way. Arbitrariness is the next ground of attack alleging that the Deputy Executive Engineer Shri V.B.Bhatt, who was

directly responsible for the negligence in discharging his duties, was not suspended and he retired on 30.4.2000. It is also alleged that Shri D.R.Swaminarayan, Executive Engineer, who is also directly responsible for the charge, was not suspended rather he has been promoted to the post of Superintending Engineer. It is also alleged that in all eight persons, were directly responsible for the charge, but out of them four persons, viz. Shri R.H.Shah, Assistant Engineer, Shri J.V.Patel, Additional Assistant Engineer, Shri D.C.Patel, Assistant Engineer and Shri T.H.Shroff, Assistant Engineer are still continuing in service with the respondents and that Shri D.C.Patel and T.H.Shroff were exonerated from the charges without initiating any Departmental Enquiry against them. Allegation of malafide has also been made in passing the impugned suspension order. After getting the petition amended it was alleged that the suspension order was passed after 4 years of alleged incident hence it is liable to be quashed.

6. In the counter Affidavit all these allegations have been denied and it has been maintained that the suspension order is valid and is in accordance with law. It is also stated in the counter Affidavit that the suspension order has been passed after seeking opinion of the Vigilence Commission. The delay has also been attempted to be explained in the additional Counter Affidavit.

7. Shri Y.N.Oza, learned Counsel for the petitioner and Ms.Manisha Lavkumar, learned A.G.P., representing the respondents were heard.

8. Mr.Manisha Lavkumar raised a preliminary objection that the writ petitions are not maintainable inasmuch as alternative remedy of Appeal, provided under the Gujarat Civil Services (Discipline & Appeal) Rules, 1971, was not availed of by the petitioners. As such this preliminary objection is being taken up for consideration first.

9. Rule : 5 of the Gujarat Civil Services (Discipline & appeal) Rules, 1971 (for short "Rules") provides for suspension. The provision for Appeal is contained in Part : V of the Rules and the Rules 17 & 18 are relevant for this purpose. Rule : 17 provides that no Appeal shall lie against any order of an interlocutory nature or in the nature of a step-in-aid for the final disposal of a disciplinary proceeding, other than an order of suspension. It, therefore, follows that an

order of suspension is appealable. Rule : 18 provides the instances viz. the orders against which Appeal lies. Rule : 18(1)(i) provides that an order of suspension made or deemed to have been made under Rule : 5 is appealable. Thus, apparently the order of suspension is appealable in view of the provisions contained in Rules : 17 & 18. The question for consideration now is who is the Appellate Authority before whom the petitioners could have preferred an Appeal. Rule : 18(2) provides that an Appeal referred to in sub-rule (1) shall lie to an officer immediately superior to the officer who made the order. The impugned order was, however, passed in the name of Governor of Gujarat though it has been signed by the Under Secretary Hemaben Raval. The last line of the impugned order shows that the order of suspension was passed in the name of Governor of Gujarat. Consequently it will be deemed that the order was passed by the Governor of Gujarat and not by the Under Secretary, Narmada Water Resources and WS Department, namely, Hemaben Raval. There is no officer immediately superior to the Governor of Gujarat. As such no Appeal could be filed by the petitioners against the order of suspension passed against them by the Governor of Gujarat. The writ petitions are therefore maintainable. The preliminary objection of the learned A.G.P. is, therefore, over-ruled.

10. Shri Y.N.Oza, learned Counsel for the petitioner has attacked the impugned order on six grounds in the course of arguments. The first ground of attack of Shri Oza has been that incident is of 1994-95 for which the petitioners are proposed to be punished in the enquiry hence such delayed action is not permissible. The second contention has been that till date no charge sheet has been served on the petitioners and as such continued suspension without serving the charge sheet is bad in the eyes of law. The next attack has been that the responsibility for the alleged incident is of Deputy Executive Engineer as per Government Resolution and that the petitioners are not in any way responsible for the so called negligence. The next contention has been that in the preliminary enquiry the petitioners were not found directly involved in the matter, but were found indirectly involved and as such the petitioners could not be suspended. The next contention has been that the involvement of the petitioner is not of a serious nature hence also the order of suspension is bad in the eyes of law. Another attack has been that the policy of pick and choose has been adopted by the Authority inasmuch as only four persons have been suspended and not the remaining four persons, who were involved indirectly in the matter.

Another attack has been that the persons found directly responsible have not been suspended rather some of them have been permitted to retire and some of them were promoted. In the last his attack has been that the order of suspension is in violation of Government Circular of General Administration Department, regarding guidelines for suspension.

11. It is, therefore, to be seen whether the order of suspension is in contravention of the Circular of the Government dated 8.7.1970. The last ground of attack is therefore proposed to be taken up first. The Circular of General Administration Department No.CDR/1070/2891/G dated 8th July, 1970, clearly exhibits the enxiety of the Government that the Government servants should not be liberally and lightly suspended. Superceding the earlier instructions on matters of suspension the Government directed in clear terms that the suspension should be sparingly resorted to and Government servants (whether prosecuted or not) should be placed under suspension only if both the conditions set out below are satisfied.

(a) The Officer or person concerned is involved in a grave misconduct or has committed very serious offence and on the basis of available evidence there is a prima facie case for his dismissal, removal or compulsory retirement, and

(b) (i) There is reason to believe that the continuance of the Government Servant in active service is likely to hamper the inquiry or investigation or to afford opportunity for interference with the witnesses or tampering with the evidence; or

(ii) His continuance in service is likely to afford him an opportunity to indulge in the commission of similar misconduct or offence as envisaged in B.C.S.R. 156.

It further provides that in respect of any other irregularity or misconduct suspension should not be resorted to.

It is therefore clear from the aforesaid circular that suspension is to be resorted to only when both the conditions are satisfied. If any one of the conditions is missing, suspension order can not be passed. Further in respect of any other irregularity or misconduct other than those mentioned in the two grounds mentioned above the order of suspension can not be resorted.

12. Testing the impugned order with the guidelines

contained in the aforesaid circular it is found that in the impugned suspension order the allegation is that on account of carelessness shown, there has been allegation of excess escavation work to the extent of 24 % which has caused burden of about Rs. 154 lacs to the Government. In doing so the petitioners have shown serious negligence and gross carelessness. Thus, the allegation against the petitioners in the suspension order is that they acted in a careless or gross careless manner on account of which loss of Rs.154 lacs was caused to the Government. The question now is whether on these averments suspension order could be passed. In the counter Affidavit of Shri A.G.Shaikh, Deputy Secretary, Narmada Water Resources & WS Department, it is deposed in Para : 6 that the petitioners were found negligent in discharging their duties for carrying out the levelling work in the year 1995-96. In Para : 8 of the said Affidavit it is mentioned that the petitioners were secondary responsible for not guiding or not directing proper attention of their superior. In the additional counter Affidavit of Gita N. Pandya, Under Secretary, it is deposed in Para : 2 that the petitioners have been held to be negligent pursuant to the preliminary inquiry report. In the preliminary enquiry report (Annexure : D) it is clearly disclosed that the petitioners have been found responsible indirectly. The preliminary enquiry report therefore rules out the possibility that the petitioners were responsible directly for alleged excess escavation causing loss to the Government. A person who was found indirectly responsible cannot be said to have committed serious misconduct of this nature that he should have been suspended.

13. It was rightly contended by Shri Oza, on the strength of Circular Annexure : D, that the primary responsibility is on the other officers, who are directly involved and not the petitioners. For ready reference Para : (i) of the Circular dated 28th June 1990 of Sardar Sarovar Narmada Nigam Ltd. is quoted below :

> "The initial levels of the ground along canal alignment and borrow area (where stripping quantity is to be paid) shall be taken invariably by Deputy Executive Engineer himself and entered in ink directly in the field books as per the prevalent practice. Deputy Executive Engineer shall submit the copy of record of initial levels to the Executive Engineer and Superintending Engineer within a week's time from taking initial levels. The longitudinal sections and cross sections plotted on the basis of these levels shall be prepared and updated estimates of

earthwork in cutting, banking and borrowed earth prepared and submitted to the Executive Engineer and Superintending Engineer within a month's time from taking initial levels. Executive Engineer should report variations in quantities from those estimated. The Superintending Engineer should then take a decision whether further check is necessary."

14. It is thus clear from the above circular that there is mandatory provision that the initial levels of the ground along canal alignment and borrow area shall be taken invariably by the Deputy Executive Engineer himself and entered in ink directly in the field books as per the prevailant practice. The Deputy Executive Engineer shall submit the copy of record of initial levels to the Executive Engineer and Superintending Engineer within a week's time from taking initial levels. In this Circular no responsibility or liability has been caused upon the petitioners. Consequently it is found from the preliminary inquiry report that the petitioners were indirectly responsible and they were not directly responsible for the loss to the Government and that their liability at the most can be said to be secondary liability. It is not the case where the petitioners are involved in a grave misconduct. What constitutes misconduct has been discussed by the Apex Court in UNION OF INDIA V/S. J. AHMED, reported in AIR 1979 SC 1022. No doubt it was a case under All India Services (Death-cum-Retirement Benefits) Rules (1958), yet the ratio of this case can successfully be applied to the case before me. The Apex Court has laid down that the inhibitions in the Conduct Rules clearly provide that an act or omission contrary thereto so as to run counter to the expected code of conduct would certainly constitute misconduct. Lack of efficiency, failure to attain the highest standard of administrative ability while holding a high post would not themselves constitute misconduct. There may be negligence in performance of duty and a lapse in performance of duty or error of judgment in evaluating the developing situation may be negligence in discharge of duty but would not constitute misconduct unless the consequences directly attributable to negligence would be such as to be irreparable or the resultant damage would be so heavy that the degree of culpability would be very high. It is, therefore, clear from the verdict of the Apex Court that the lack of efficiency, failure to attain the highest standard of administrative ability while holding a high post would not themselves constitute misconduct. From the material

on record before me it is spelled out that the allegation against the petitioners is that they were negligent in discharging their duties and that they did not properly assist their superior. However, this failure cannot be styled as misconduct in the light of the aforesaid verdict of the Apex Court. If it is not misconduct then it cannot be said to be grave misconduct within the meaning of Para (a) of the Circular dated 8.7.1970. If the first condition of the circular goes then the order of suspension becomes illegal.

15. Secondly there is nothing to indicate in the suspension order that the continuance of the petitioner in active service is likely to hamper the enquiry or investigation or to afford opportunity of interference with the witnesses or tampering with the witnesses or his continuance in service is likely to afford him an opportunity to indulge in commission of similar misconduct or offence as envisaged in B.C.S.R. 156.

16. If it is a case where both the conditions in Para (a) & (b) of the Circular are not made out then the impugned order of suspension becomes illegal. It further becomes illegal because in last portion of Para : 1 it is provided that in respect of any other irregularity or misconduct suspension should not be resorted to. If at all negligence of the petitioner is to be considered as misconduct then also the suspension order could not be passed. More over misconduct as alleged against the petitioners is not in accordance with the observation of the Apex Court in Union of India v/s. J. Ahmed (Supra).

17. Thus, the last attack of Shri Oza has to be accepted and on this ground the impugned suspension order against the three petitioners have become illegal and liable to be quashed and set aside.

18. Shri Oza has next contended that selective suspension is not permissible and such suspension has been depricated by the Apex Court for which he has relied upon the case of K. SUKHENDAR REDDY v/s. STATE OF A.P. reported in 2000 (1) S.L.R. 23. However, this contention has no merit in view of the additional Counter Affidavit of Gita N. Pandya, Under Secretary, wherein it is clearly deposed that the matter was under investigation and all the persons found involved in the matter have been suspended on 9.12.2000 pending departmental enquiry. It is clearly deposed that Shri D.R.Swaminarayan, Shri N.R.Rana, Shri J.B.Patel and Shri R.H.Shah were duly suspended on 9.12.2000. Consequently it cannot be said to be a case of selective suspension or

suspension by pick and choose.

19. I do not find any merit in the contention of Shri Oza that the persons found directly responsible have not been suspended. A definite reply to this argument is contained in the additional counter Affidavit of Ms. Gita N. Pandya wherein it is deposed that all the persons found directly responsible in the incident have been suspended.

20. The next contention of Shri Y.N.Oza is that the petitioners are not directly involved, but indirectly involved and that the involvement of the petitioner is not serious. The said argument is covered under the last attack of Shri Oza which has been considered in the forgoing portion of this judgment.

21. Violation of Government Resolution has also been considered in the forgoing portion of this judgment where the responsibility of Deputy Executive Engineer, etc. has been discussed.

22. Another attack of Shri Y.N.Oza has been that the incident is of 1994-95 for which the petitioners are being harassed and their suspension order is not maintainable. However, since the petitioners have not challenged the disciplinary proceedings or preliminary enquiry proceeding I do not think it expedient to discuss in detail the above contention of Shri Oza because that may hamper the preliminary inquiry and the final enquiry. However, the fact remains that the suspension order was passed after lapse of about 5 to 6 years of the incident which occurred in 1994-95 whereas the suspension order was passed on 27.4.2000. Some attempt has been made in the additional counter Affidavit of Ms.Gita N. Pandya to explain the delay. However, this Affidavit clearly shows that the suspension order was passed mainly on the recommendation of the Vigilence Commission. In Para : 1 of Additional Counter Affidavit it is mentioned that several complaints were received and also the report from the Vigilance Commission. The Vigilance Commission directed that these complaints be looked into. The preliminary inquiry was entrusted on 26.11.1997. Enquiry Report was received on 2.12.1998. Further documents were called for on 6.1.1999 and 7.2.1999. Enquiry Report was received in which it was found that 12 employees and officers were responsible for irregularities committed therein. Show cause notice was issued on 3.5.1999 to the petitioners. The petitioners submitted reply to the show cause notice between June, 1999 to October, 1999. Replies were sent for opinion of Sardar Sarovar Narmada

Nigam Ltd. on 28.10.1999 and on receipt of opinion from Sardar Sarovar Narmada Nigam Ltd. on 22.3.2000, five cases, including the cases of the petitioners, were referred to the Vigilance Commission on 3.4.2000. The Vigilance Commission recommended suspension of four employees and charge sheet to one delinquent. The said recommendation was received on 7.4.2000 and on its basis the charge sheet was issued to Shri V.B.Bhatt, Deputy Executive Engineer on 24.4.2000. He was to retire on 30.4.2000. In accordance with recommendation of the Vigilance Commission four delinquents, including the petitioners, were suspended on 27.4.2000 and others were suspended on 9.12.2000. It is therefore manifestly clear that the suspension orders were passed on the recommendation of the Vigilance Commission though there was nothing in the preliminary inquiry report to show that it was a case of gross misconduct. Thus, though there has been some attempt to explain the delay, yet on the totallity of the facts and circumstances of the case the suspension of the petitioner was hardly warranted or called for. It may also be mentioned that so far no decision has been taken to initiate final disciplinary proceeding against the petitioners. Neither Enquiry Officer has been appointed nor the charge-sheet has been submitted though the report of preliminary enquiry was received on 7.2.1999 as admitted in the counter Affidavit of Ms. Gita N. Pandya. Still from 7.2.1999 to 26.4.2000 nothing was done to place the petitioners under suspension.

23. The suspension of the petitioners during active consideration of the preliminary enquiry report is hardly justified. In Para : 6 of the Counter Affidavit of Shri A.G.Shaikh it is mentioned that at present preliminary enquiry report is under active scrutiny with Government which is confidential. The allegation against the petitioners was not so alarming and did not constitute serious misconduct which calls for suspension at the stage of preliminary enquiry. Suspension could be ordered in contemplation of final enquiry or during progress of final enquiry, but suspension during preliminary enquiry can hardly be justified.

24. Shri Y.N.Oza has cited number of cases on the point of delay. I have considered those cases, some of the cases are distinguishable because they relate to Commission of Criminal offences or offences under the Prevention of Corruption Act. Other cases are on delay in passing the suspension order, but in view of explanation of delay offered in the counter Affidavit of Ms. Gita N. Pandya, Under Secretary, it cannot be said that the order

of suspension can successfully be challenged on this ground.

25. For the reasons stated above, I find that the impugned order of suspension is unwarranted, illegal and in clear violation of the guidelines contained in Circular dated 8.7.1970. As such the impugned suspension orders have to be quashed and set aside.

26. In the result these three petitions succeed. Special Civil Application Nos.10576, 10577 and 10578, all of 2000 are hereby allowed. The impugned order of suspension dated 27.4.2000 in all the three petitions is hereby quashed and set aside. The petitioners shall be reinstated by the respondents at their original posts with all consequential and incidental benefits arising out of seting aside the impugned suspension order. No order as to costs.

sd/-
Date : March 16, 2001 (D. C. Srivastava, J.)

sas